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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE

WALTER FEINSTEIN, JASON I. GREEN, JACK KRIEGSMAN, LEO MILLER, AND MORTON H. PASTOR,

Petitioners

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The petition for a writ of mandamus is directed to the district court's routine management of its workload in an action pending before it. Petitioners seek an order from this Court directing the district court either to set a date for jury trial of petitioners' civil antitrust action, or enter a judgment therein from which an appeal may be taken. By minute order of December 24, 1981, the district court has granted respondents' motions for summary judgment in the action, stating "Court to issue Memorandum and Findings" (Pet., p. 14). The petition is based upon no more than petitioners' unwillingness to await the district court's orderly preparation of its memorandum and findings.[1]

We respectfully submit that the respondent court's regulation of its calendar, which is a matter committed to

[1] The instant petition is the *fourth* request for extraordinary relief by petitioners since December 24, 1981: petitioners sought similar

its discretion, is in full compliance with the Federal Rules of Civil Procedure and that, in any event, there is no basis for extraordinary review by mandamus of the district court's actions.

STATEMENT OF THE CASE

Petitioners are five medical doctors who are plaintiffs in *Feinstein, et al., v. Nettleship, et al.,* pending in the Central District of California. Petitioners allege that a group insurance program of the Los Angeles County Medical Association violated the antitrust laws. Respondents, defendants in the district court, are the insurance brokerage firm that acted as underwriting manager for the program, one of the carriers, and four reinsurers.[2]

In 1977, the district court granted summary judgment in favor of respondents in reliance upon a Ninth Circuit decision[3] which had limited the scope of the "boycott" exception in § 3(b) of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015, to activity against insurance companies or agents. Petitioners appealed to the Ninth Circuit. While that appeal was pending, this Court overruled *Addrisi* and held that policyholders may also be included in the §3(b) exception. *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531 (1978).

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relief in petitions for writs of mandamus filed in the United States Court of Appeals for the Ninth Circuit on January 29, 1982 and on April 7, 1982, both of which were denied (Pet., pp. 14-15), and in a petition for writ of certiorari lodged in this Court on May 12, 1982, which was later withdrawn.

[2] Respondents are The Nettleship Co. of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, American Re-Insurance Company, North American Reinsurance Corporation, and Sentry Insurance A Mutual Company. A list of respondents' subsidiaries and affiliates pursuant to Rule 28.1 is contained in Appendix A attached hereto.

[3] *Addrisi* v. *Equitable Life Assurance Society of U.S.,* 503 F.2d 725 (9th Cir. 1974), certiorari denied, 420 U.S. 929 (1975).

In November 1979, following oral argument on the appeal in the case at bar, the Ninth Circuit remanded the case to the district court for reconsideration for a period of 91 days. The remand order stated that it was prompted by this Court's decision in *Barry*, overruling *Addrisi*, but also noted respondents' position that the judgment was sustainable on grounds other than *Addrisi* (Pet.Appx., pp. A-1 to A-2).[4]

Following remand, respondents in January 1980 moved the district court to reaffirm the summary judgment on grounds other than *Addrisi*. The district court vacated its final judgment, directed the filing of further briefs and supporting material, and requested the Ninth Circuit to extend the period of remand for another 60 days.[5]

In August 1980, the district court granted in part and denied in part respondents' motion for reaffirmance of the summary judgment. Petitioners then filed a motion for class certification.[6] The petition (pp. 10-12) quotes *only part* of the transcript of the proceedings in the district court in

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[4] The remand order also stated:

"It is suggested that the district court lift its final judgment before reconsidering the case. • • •

"On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below" (Pet.Appx., p. A-2).

[5] In June 1980, the Ninth Circuit extended the remand to September 18, 1980 (Pet., p. 9), and has ordered further extensions from time to time, most recently to June 29, 1982 by an order dated May 4, 1982 (Pet.Appx. G).

[6] The petition itself shows the falsity of petitioners' assertion (Pet., p. i) that the district court has "consistently refuse[d]" to consider the question of class certification. The district court denied without prejudice a motion for class certification in August 1971 (Pet., p. 3); a second motion was denied December 9, 1974 (*id.*, p. 4); petitioners' third motion for class certification was filed in May 1975 (*id.*, p. 10) and was submitted with the summary judgment motion which led to the 1977 judgment dismissing the action. The trial court, in light of dismissal of the action, did not consider the third class action motion.

connection with the class certification motion. On November 3, 1980, the court indicated initially that a class would be certified, but after further argument deferred making any order until after petitioners had filed a particularized statement of the evidence upon which they intended to rely on the issues of boycott, coercion and intimidation (November 3, 1980 Transcript, pp. 25-28). At further hearing on February 2, 1981, the court again referred to a contemplated class certification (Pet., p. 15), but found: "that there is just noncompliance by the [petitioners] with the orders of the Court or at least the articulated requirements of the Court" with regard to petitioners' delineation of the evidence (February 2, 1981 Transcript, pp. 14 and 36). The court accordingly ordered a further particularization of petitioners' evidence and deferred ruling on the request for class certification. (*id.*, p. 48).

Petitioners' statement of evidence in response to the last order suggested lack of genuine issues of fact and respondents moved for summary judgment. Before the motions were fully briefed, however, Judge Kelleher recused himself because his son had joined a law firm representing one of the respondents. On May 29, 1981 the case was assigned to Judge Byrne. In June, Judge Byrne ruled that petitioners' most recent motion for class certification had not been determined by Judge Kelleher and was before him (June 19, 1980 Transcript, p. 7). Petitioners thereupon filed a petition for mandamus with the Ninth Circuit claiming, *inter alia*, that the district court should be directed to set a trial date and to grant the motion for class certification or, in the alternative, that the Ninth Circuit should schedule an immediate hearing (Pet., pp. 13-14). The petition was denied (Pet.Appx., p. A-7).

Respondents' motions for summary judgment were argued November 6, 1981 and, as noted, resulted in the December 24 order that summary judgment would be granted with memorandum and findings to be issued. Petitioners then, on January 29 and again on April 7,

1982, sought mandamus from the Ninth Circuit asking, *inter alia,* that the district court be ordered to act. (The April 7 petition asked that the district court be ordered to set a date certain for trial (Pet., p. 15).) Those petitions were denied on March 2, 1982 and May 4, 1982, with the Ninth Circuit on each occasion extending the time of the remand. The latest extension will expire June 29, 1982 (Pet. Appx. G).

REASONS WHY THE WRIT SHOULD BE DENIED

The case presents none of the "exceptional circumstances" warranting exercise of the Court's discretionary powers under Rule 26. When the district court's memorandum and findings are issued, judgment can be entered from which petitioners may take an appeal. In the meantime, petitioners are in exactly the same position as any party to a suit which has been argued and submitted but not yet decided. [7]

Petitioners erroneously assert that the district court has not since March 1980 made any request to the Ninth Circuit for an extension of its remand, and that the district court "may never act" (Pet., p. 16). There is absolutely no foundation in this record for those assertions. The petition itself shows that in June 1981 the district court, concerned with the possible expiration of the period of remand, ordered the parties to join in a request to the Ninth Circuit for a further extension (Pet., p. 12). The Ninth Circuit, through the multiple petitions filed by petitioners herein, is obviously cognizant of the passage of time in the case; there is no reason to speculate

[7] Petitioners, who here complain of the time required to prepare the district court's memorandum and findings, did not facilitate that process. In opposition to respondents' summary judgment motions, petitioners did not identify specific evidence bearing on specific factual issues. Instead, they purported to rely generally upon all their evidence, consisting of 1176 exhibits, 1257 pages of deposition testimony and numerous memoranda filed over a number of years.

that entry of judgment will be unreasonably delayed by the district court.

The record is equally devoid of support for the notion (Pet., p. 15) that there has been no "hearing" on petitioners' appeal. The Ninth Circuit's order remanding the case for reconsideration in light of *Barry* was made after oral argument on the appeal. As a result of that remand, the district court vacated its 1977 judgment against petitioners. The further assertion that the district court has refused to consider the question of class certification has already been answered (see pp. 3-4, *supra,* n. 6). The class certification question was further considered during the pretrial proceedings on November 3, 1980 and February 2, 1981 (see Pet., pp. 10-12). Judge Kelleher deferred ruling then because petitioners had failed to comply with his requirement of a particularized statement of their evidence. Judge Byrne's subsequent granting of respondents' motions for summary judgment made unnecessary further consideration of the class certification question.

In any event, we submit that an extraordinary writ by this Court is neither necessary nor appropriate to fix the time within which the district court must issue its memorandum and findings after granting the motions for summary judgment.

In *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976), relied upon by petitioners (Pet., p. 17), the Court noted the remedy of mandamus is a "drastic one" and pointed out that "the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy' " (426 U.S. at 402, quoting *Will* v. *United States,* 389 U.S. 90, 95 (1967)). The case at bar wholly lacks those elements of public importance and exceptional character so as to call for the exercise of this Court's discretion to issue the writ (*see, e.g., Ex Parte Peru,* 318 U.S. 578, 585-586 (1943)).

This is not a case where the district court has exceeded or refused to exercise its jurisdiction. Here, the most that could be claimed is that the district court is slow in issuing an opinion, albeit it has not exceeded the time contemplated by the Ninth Circuit.[8]

Petitioners must satisfy " 'the burden of showing that [their] right to issuance of the writ is "clear and indisputable." ' " *Kerr* v. *United States District Court, supra,* 426 U.S. at 403, quoting *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 384 (1953); and *see, Will* v. *United States, supra,* 389 U.S. at 96. The instant petition falls far short of this mark.

[8] Petitioners erroneously rely (Pet., p. 17) on *Connor* v. *Coleman,* 440 U.S. 612 (1979), which was before this Court for the *eighth* time, after the district court chose to ignore this Court's directive, issued 22 months previously, that it resolve expeditiously the apportionment controversy for the State of Mississippi (440 U.S. at 614 (dissenting opinion of Justice Marshall)). Nothing in the case at bar is even remotely comparable to the persistent disregard of appellate court orders present in *Connor.*

CONCLUSION

For the foregoing reasons the Court should deny the petition for writ of mandamus.

Respectfully submitted,

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June 1982.

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APPENDIX A

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of this Court's Rules, respondents provide the following information regarding their parent companies, subsidiaries and affiliates:

Pacific Indemnity Company

Pacific Indemnity Company has no subsidiaries other than wholly-owned subsidiaries and no affiliates. Ninety-nine percent (99%) of the stock of Pacific Indemnity Company is owned by Federal Insurance Company which is in turn a wholly-owned subsidiary of The Chubb Corporation. The following companies are subsidiaries (excluding wholly-owned subsidiaries) or affiliates of Federal Insurance Company or The Chubb Corporation: The Touchette Corp. (New York); Intremex, S.A. (Mexico); Latin American Reinsurance Services Ltd. (Bermuda); Hartley Cooper (Holdings) Limited of London (Great Britain); La Federacion Compania de Seguros, C.A. (Venezuela); Chubb Lloyd's Ins. Co. of Texas (Texas); Seguros "Illimani" S.A. (Bolivia); Chubb Life Insurance Co. of America (New Hampshire); UPA, Inc. (New Jersey); Bolivar Compania de Seguros del Ecuador (Ecuador); La Federation Europeenne Compagnie d'Assurance, S.A. (Belgium); Chubb Syndicate Inc. (New York); Frank B. Hall (N.Y.I.E.), Inc. (Delaware); J&H, WF Syndicate A (New York); La Federacion Compania de Seguros, S.A. (Colombia); Chubb do Brasil (Brazil); DHC Corp. (Delaware); Argos Companhia de Seguros (Brazil); and Associated Aviation Inc. (New York).

Insurance Company of North America

Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, a wholly-owned subsidiary of INA Corporation which in turn is a wholly-owned subsidiary of CIGNA Corporation.

Insurance Company of North America's subsidiaries (except thirty-three (33) wholly-owned subsidiaries) and affiliates (see 26 U.S.C. Sections 1501, 1502, 1504; Treas. Reg. Section 1.1502.1) are: Compagnie d'Assurances Colina S.A. (Ivory Coast); Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); INA International Investors, Ltd. (Pennsylvania); La Nouvelle, S.A. (France); Paine Webber Incorporated (Delaware) and its seventy-four (74) subsidiaries and affiliates; and Societe Civile Immobiliere Turina (France).

In addition to the foregoing, the parent companies of Insurance Company of North America have varying ownership interests in over three hundred and seventy-six (376) other insurance, insurance-related, health care, real estate, and investment companies, both domestic and foreign, including Connecticut General Corporation and its subsidiaries and affiliates. Should the Court desire listings of these companies, and of the subsidiaries and affiliates of Paine Webber Incorporated, Insurance Company of North America will supplement its listing.

The Nettleship Company of Los Angeles

The Nettleship Company of Los Angeles was acquired by the Frank B. Hall Co. in 1973 and as part of that transaction was dissolved.

Sentry Insurance A Mutual Company

Sentry Insurance A Mutual Company has no subsidiaries (except wholly-owned) and no affiliates. The current respondent was formerly Sentry Insurance and Hardware Mutual Casualty Company.

North American Reinsurance Corporation

North American Reinsurance Corporation is owned by Swissre Holding (N.A.) Inc., New York, New York, which is owned by Swissre Holding Ltd., Zurich, which is owned by Swiss Reinsurance Corporation, Zurich. North American Reinsurance Corporation has no subsidiaries. Affiliated companies are: F & D Holding Corp. (Delaware); Fidelity & Deposit Company (Maryland); Fidelity & Deposit Company of Maryland (Maryland); NARe Life Mgmt. Co. Inc. (New York); North American Reassurance Company (New York); SR Geothermal Inc. (Delaware); Swiss-Am Reassurance Company; Swiss Reinsurance Co. (N.A.) Inc. (New York); Swissre Advisers, Inc. (New York); Swissre Corp. (New York); Swissre Life Insurance Company; Swissre Management Corporation; "Switzerland" General Ins. Co. Ltd. of Zurich (Switzerland); Switzerland Gen. Ins. Corp. of New York (New York); and Tudor Insurance Co. (New Hampshire).

American Re-Insurance Company

American Re-Insurance Company is a wholly-owned subsidiary of Aetna Life and Casualty, a Connecticut corporation. The following companies are subsidiaries of American Re-Insurance Company: American Excess Insurance Company (Delaware); A. M. Re Brokers, Inc. (Delaware); Am. Re. Managers of Texas, Inc. (Texas); and American Independent Reinsurance Company (Delaware).